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No. 91-687

In The

Supreme Court of the United States

October Term, 1991

STATE OF MONTANA,

Petitioner,

v.

DONALD GLENN IMLAY,

Respondent.

On Writ Of Certiorari To The Montana Supreme Court

BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

Is a probationer's privilege against self-incrimination under the Fifth Amendment as applied to the states through the Fourteenth Amendment violated by a probation condition that requires completion of sex offender therapy, when successful completion of the therapy necessitates acceptance of responsibility for the crime of which the probationer was convicted?

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OPINION BELOW

The opinion of the Montana Supreme Court is reported at 813 P.2d 979 (1991). (Pet. App. 1a.)

JURISDICTION

The Montana Supreme Court's opinion was filed on June 18, 1991. (Pet. App. 1a.) The order denying the petition for rehearing was entered July 23, 1991. (Pet. App. 26a.) Jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

1. The Fifth Amendment to the United States Constitution:

> No person . . . shall be compelled in any criminal case to be a witness against himself[.]

2. Mont. Code Ann. § 45-5-502 (1989):

> **Sexual assault**. (1) A person who knowingly subjects another not his spouse to any sexual contact without consent commits the offense of sexual assault.
>
> (2) A person convicted of sexual assault shall be fined not to exceed $500 or be imprisoned in the county jail for any term not to exceed 6 months, or both.
>
> (3) If the victim is less than 16 years old and the offender is 3 or more years older than the

victim or if the offender inflicts bodily injury upon anyone in the course of committing sexual assault, he shall be imprisoned in the state prison for any term not to exceed 20 years and may be fined not more than $50,000.

(4) An act "in the course of committing sexual assault" shall include an attempt to commit the offense or flight after the attempt or commission.

(5) Consent is ineffective under this section if the victim is less than 14 years old and the offender is 3 or more years older than the victim.

STATEMENT OF THE CASE

On May 9, 1989, Donald Imlay was charged by information with sexual assault of a seven-year old girl. Mont. Code Ann. § 45-5-502(3) (1989). (Joint Appendix [J.A.] 10.) According to the affidavit in support of the information, on the afternoon of April 11, 1989, the little girl told her teacher and mother that the owner of the Parkdale Grocery store had "played with her privates" earlier that day. (J.A. 5.) The child victim's version of the assault was recounted in the affidavit in support of motion for leave to file information.[1]

On the morning of April 11, 1989, the victim was on her way to school and stopped by a local grocery store

[1] No transcript was ever made of the original trial because Imlay did not appeal his conviction; he only later appealed revocation of his probation.

where she talked with the man behind the counter who was later identified as Donald Imlay. She stated that the man took her by the hand, leading her into the store's office, where he placed her on his knee, unzipped her pants and fondled her vaginal area. After the man left, the little girl hid in the office. He returned moments later, found her hiding, and fondled her again for several minutes. When he left again, the frightened girl went to the basement to hide. She heard someone come down the stairs and waited in hiding until the person left. When she returned upstairs, she was again met by the man. She was led into the living room of his home adjoining the store and office. He sat on the chair, placed her on his lap, and again sexually assaulted her. When he finally stopped, he gave her a lollipop and told her not to tell anyone.

The victim reported the incident to her teacher and her mother, who called the police. The police took the girl to a hospital where the attending physician found abrasions in regions of the victim's clitoris and labia.

At the jury trial, the victim, the physician, the police officer, the victim's mother, her teacher, and a psychologist testified on the State's behalf. (Minute Entries dated September 11 and 12, 1989.) Donald Imlay, his son, and a private investigator testified on behalf of the defendant. (Minute Entry dated September 13, 1989.) Imlay denied any sexual contact with the girl. The defendant's version of the incident is related in the presentence report. (Presentence report, NR # 57.) Imlay stated that the victim had come into his store on the morning of April 11, 1989, but denied that he had fondled her. He described her as hiding in the various parts of the store, including the

office and basement, and being difficult to remove from the store. (Presentence Report at 3-4, NR # 57.)

Donald Imlay was found guilty of felony sexual assault. He was sentenced to five years in the Montana State Prison, with the prison term suspended on the primary condition that he "immediately enroll in a sexual therapy program at his own expense and continue said program until his therapist deems further counseling and therapy unnecessary." (J.A. 22.) He did not appeal the conviction or sentence.

While on probation, Imlay enrolled in a sexual therapy program and participated in the program for four months, meeting with his therapist a total of six times. (Tr. at 34, NR #92.)[2] Throughout therapy, Imlay denied that sexual contact had occurred between himself and the child. (Tr. at 35.) No progress was made in the therapy because of Imlay's continued denial. By March 6, 1990, during the fifth appointment with Michael Sullivan, Imlay's therapist, Imlay was told that he could not continue with outpatient treatment unless he accepted responsibility for the act of which he had been convicted. (Tr. at 41.) At the sixth and final meeting, both Sullivan and Imlay's probation officer, Barbara Nihill, met with Imlay and again informed him that he would have to admit the acts to remain in outpatient treatment. (Tr. at 43.) Sullivan explained to Imlay the problem of denial as a defense mechanism. Sullivan was frustrated because he

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[2] The reference is to the transcript of the probation revocation hearing held August 31, 1990, and September 4, 1990. The references are to Volume I of the transcript unless otherwise indicated.

could not successfully treat anyone who did not show any accountability or responsibility for his actions. (Tr. at 55.)

In Sullivan's opinion, Imlay was simply not acceptable for outpatient treatment. (Tr. at 56.) He believed that inpatient treatment might be better for Imlay because it could be provided on a daily basis, with more structure than outpatient therapy. *Id.* The only inpatient treatment center for sex offenders in Montana is located at the Montana State Prison. (Tr. at 59-60.)

Imlay's inability to make progress in the sexual offender treatment program caused great concern to his probation officer, Barbara Nihill. (Tr. at 10-11.) Her concern was grounded in the risk Imlay posed to the community. She stated, "If we have an offender who is clearly in denial, he is obviously in greater risk of reoffending than one who is recognizing and accepting responsibility for his problem." (Tr. at 11.) In her assessment, allowing Mr. Imlay to continue in outpatient therapy placed at risk the community where he lived. (Tr. at 11-12.)

Sullivan also expressed the view that community safety is the primary objective of the sex offender treatment programs and for that reason an outpatient program cannot continue to treat a person who fails to accept responsibility for his acts. (Tr. at 42.) Sullivan stated that it was, in fact, unethical for him to continue outpatient treatment of a person whom he believed was a threat to the safety of the community. *Id.* Sullivan felt that he could not assure appropriate community safety if the patient is in denial of a sexual offense. *Id.*

Based upon the above testimony, the district court revoked Imlay's suspended sentence and imposed a five-year sentence at the Montana State Prison, where inpatient sex offender treatment was available. (J.A. 35-36; Tr. at 67.) The court noted it had no alternative but to find a probation violation. (Tr. at 67-68.) The court further recommended in its order that Imlay be eligible for parole once he completed the sex offender program at the prison. (J.A. 36.)

Imlay appealed the district court's decision to the Montana Supreme Court, claiming that the condition requiring him to comply with sex offender treatment was unconstitutionally vague, that the condition violated his right to self-expression protected under the First Amendment to the United States Constitution, and that the condition was generally inequitable and unfair. Imlay did not raise on appeal the issue of whether the condition to complete sex offender treatment violated his privilege against self-incrimination. However, the Montana Supreme Court raised the issue *sua sponte*, concluding that the condition to complete the sex offender program violated Imlay's privilege against self-incrimination because it required his admission of guilt for the crime of which he had been convicted. (Pet. App. 8a-15a.) The Montana Court reasoned that the revocation of probation constituted a penalty for maintaining his innocence. The Court also suggested that Imlay would be subjecting himself to possible perjury charges and would be jeopardizing possible collateral relief in state postconviction or federal habeas proceedings if he admitted to the acts for which he was convicted. The Court reversed the district

court order revoking the suspended sentence, vacated the sentence, and remanded the matter.[3]

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[3] Because the Montana Supreme Court vacated Imlay's sentence and because the original sentence was based primarily on the condition that Imlay undergo sex offender treatment, the state district court, on remand, had little alternative but to sentence Imlay to prison without the condition or recommendation that he undergo both phases of inpatient sex offender treatment that would require acceptance of responsibility for the crime of which he had been convicted and without the recommendation that Imlay receive ongoing treatment upon parole.

Subsequent to the filing of the petition for certiorari, Imlay filed a *pro se* petition for writ of habeas corpus in the Montana Supreme Court challenging the resentencing, claiming he was improperly denied parole and his counsel was ineffective for failing to challenge the resentencing. Imlay did not challenge his conviction in the habeas petition. Interestingly, Imlay's challenge to the denial of parole is based upon the argument that the Montana Board of Pardons improperly denied parole for failure of Imlay to go through Phase I of the sex offender treatment program at the prison. Phase I of the sex offender program at the prison is only an educational phase and does not require acceptance of responsibility of the crime for which a defendant has been convicted. Successful completion of Phase I of the prison program would therefore not be affected by the Montana Court's decision. The State's response to the state habeas petition is due April 24, 1992.

The decision below does potentially restrict prison authorities and the parole board from requiring completion of Phase II of the sex offender treatment at the prison because Phase II of the prison program requires acceptance of responsibility of the crime of which an inmate has been convicted. Because the Montana Supreme Court expressly overruled *State v. Donnelly*, 798 P.2d 89 (Mont. 1990) (privilege against self-incrimination is

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SUMMARY OF ARGUMENT

The Fifth Amendment privilege against self-incrimination provides in pertinent part that no person "shall be compelled in any criminal case to be a witness against himself."[4] Governments may not "by coercion prove a charge against an accused out of his own mouth." *Malloy v. Hogan*, 378 U.S. 1 (1964). Impermissible governmental coercion arises when the government places an individual in a situation where he or she must make the Hobson's choice between giving incriminating statements or incurring a potent sanction. *Garrity v. State of New Jersey*, 385 U.S. 493, 496 (1967); *Lefkowitz v. Cunningham*, 431 U.S. 801, 805 (1977). Imlay was never forced to make an impermissible, coerced choice violative of his Fifth Amendment privilege against self-incrimination because the probation condition did not require him to make incriminating

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not violated by denial of parole for failure to complete sex offender program at prison), the Board of Pardons and the prison administration could be precluded from requiring completion of Phase II of the sex offender program. As a result, sex offenders could become eligible for parole without obtaining meaningful treatment.

[4] Imlay has never exercised his Fifth Amendment rights in the traditional fashion of refusing to answer on the grounds that his statements might incriminate him in a future criminal prosecution. He has merely maintained his innocence, continuing to deny that he committed the offense. The Montana Supreme Court found, however, that Imlay had adequately preserved a Fifth Amendment challenge to the probation condition when Imlay claimed at the revocation hearing that the condition improperly compelled an admission of guilt. *See* Pet. App. at 8a; Tr. Vol. IIB at 55.

statements and because revocation of probation is not a penalty that triggers Fifth Amendment protections.

Because this matter arose in a probationary setting designed to promote treatment and rehabilitation and because Imlay had already been convicted and sentenced of the sexual assault, the Fifth Amendment privilege against self-incrimination was never really pertinent, much less controlling. After conviction of the sexual assault, Imlay could have initially received a five-year prison sentence, with no years suspended.[5] The sentencing court, however, showed considerable leniency and gave Imlay the opportunity for treatment by suspending his sentence on the condition that he complete sex offender therapy. The therapy was designed to help Imlay overcome his denial and lead him toward meaningful rehabilitation.[6] When it became apparent that Imlay could not benefit from outpatient sex offender therapy and was not amenable to such treatment because of his continued denial, his probation was revoked. Such a scenario does not give rise to valid and controlling Fifth Amendment considerations.

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[5] Mont. Code Ann. § 45-5-502(3) (1989).

[6] The acceptance of responsibility and overcoming denial of a problem are widely accepted as the first steps toward rehabilitation. A basic objective in modern penology is to have the punishment "fit the offender and not merely the crime," *Williams v. New York*, 337 U.S. 241, 247 (1949), and accordingly sentences must be structured "with an eye toward 'reformation and rehabilitation of offenders.' " *United States v. Grayson*, 438 U.S. 41, 45 (1978). This philosophy is reflected in § 3E1.1, U.S.S.G. and discussed in the brief submitted by *amicus curiae* American Professional Society on the Abuse of Children.

The Fifth Amendment privilege against self-incrimination addresses only a relatively narrow scope of inquiries. The constitutional right to remain silent does not arise unless the testimony sought by the government would subject the giver to criminal liability. *Garner v. United States*, 424 U.S. 648, 655 (1976). An individual may therefore be compelled to provide statements in a noncriminal investigation. *Id.*, citing *Gardner v. Broderick*, 392 U.S. 273, 278 (1968).[7]

Imlay's statements relating to acceptance of responsibility were sought solely for treatment purposes. When a state seeks statements for treatment and rehabilitation purposes, rather than for the purposes of incrimination and punishment, the Fifth Amendment privilege does not protect such statements. *Allen v. Illinois*, 478 U.S. 364 (1986).

The statements concerning acceptance of responsibility for the crime also did not realistically subject Imlay to the threat of future criminal prosecution. The Fifth Amendment privilege protects only answers that might incriminate a defendant *"in future criminal proceedings."* *Minnesota v. Murphy*, 465 U.S. 420, 426 (1984) (quoting *Lefkowitz v. Turley*, 414 U.S. 70, 77 (1973) (emphasis

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[7] In *Gardner*, this Court held that the Fifth Amendment privilege precluded a policeman's dismissal for his refusal to waive immunity in response to questions concerning alleged bribery and corrupt practices of police officers. The holding was qualified, however, by the recognition that Fifth Amendment protections would not extend to questions concerning the police officer's performance or other questions that would not expose the officer to future criminal prosecution.

added). Imlay had already been convicted of and sentenced for the crime by the time he was asked to discuss it.[8] Imlay did not appeal his conviction, so discussion of the crime would not jeopardize an appeal. The Montana Supreme Court suggested that Imlay might be jeopardizing his ability to collaterally attack his conviction or might be exposing himself to a possible perjury charge if he accepted responsibility of the crime. The risk to possible future collateral attacks of the conviction or the threat of a possible perjury charge are of such a speculative and unrealistic nature, however, that neither can be considered sufficient to create a viable threat to Imlay's Fifth Amendment privilege against self-incrimination.

The State's interest in supervising its probationers and devising appropriate treatment for them while protecting society is a crucial consideration in determining the extent of Imlay's Fifth Amendment privilege. The concerns for proper treatment and public safety justify, on the one hand, the attempt at rehabilitation through imposition of the condition requiring acceptance of responsibility and, on the other hand, justify revocation of probation when the treatment has failed. There was therefore never any type of "penalty" imposed upon Imlay for a valid exercise of his Fifth Amendment privilege against self-incrimination.

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[8] It is axiomatic that the self-incrimination which the Amendment forbids is exposure to a criminal charge. *Ullmann v. United States*, 350 U.S. 422, 431 (1956). Thus, once the threat of incrimination ceases, the amendment ceases to apply. *Reina v. United States*, 364 U.S. 507, 513 (1960).

The Montana Supreme Court's decision has had a detrimental effect on the sentencing options available to state district courts, and consequently severely restricted the opportunities for treatment of defendants. If the Montana Court's decision were left to stand as controlling law in Montana or accepted by other forums as persuasive authority, a sentencing court could not impose a probation condition, based on concerns for treatment and rehabilitation, that requires discussion of pertinent behavior in order to break through denial of the acts of which a probationer has already been convicted. The decision effectively eliminates the possibility of effective treatment or therapy for sexual offenders, like Imlay, who maintain denial of a behavioral problem, and requires incarceration without treatment as the only sentencing option. The privilege against self-incrimination was never intended to be used to a defendant's detriment, blocking possible treatment in a community-based setting.

ARGUMENT

I. A PROBATIONER'S FIFTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION IS NOT VIOLATED BY IMPOSITION OF A PROBATION CONDITION WHICH ULTIMATELY REQUIRES ACCEPTANCE OF RESPONSIBILITY OF THE CRIME FOR WHICH THE PROBATIONER HAS BEEN CONVICTED.

The probation condition requiring sex offender treatment gave Imlay the choice of either discussing with a therapist the acts of which he was convicted and suffering no further realistic threat of a criminal penalty, or

maintaining his innocence and facing potential probation revocation. This choice did not place Imlay in a coercive situation where Fifth Amendment concerns might be controlling because Imlay did not have to choose between making incriminating statements or suffering a potentially impermissible penalty. The suspended sentence given to Imlay on the condition that he undergo sex offender therapy was a lenient sentence, designed to provide him with the benefit of treatment in a community-based program.

Moreover, Imlay, as a convicted defendant and a probationer, was subject to the reasonable and necessary principles and considerations governing a state's authority to impose a probation condition rationally related to Imlay's rehabilitation and to revoke probation when the attempt at rehabilitation failed. That successful completion of the condition required Imlay to accept responsibility of the crime of which he had been convicted did not violate Imlay's Fifth Amendment privilege against self-incrimination because acceptance of responsibility of criminal behavior is generally accepted as the first essential step toward meaningful treatment and because his acceptance would not subject him to future criminal liability.

A. The Probation Condition Requiring Sex Offender Treatment Is Rationally Related to the Goals of Sentencing.

The broad discretion of the sentencing judge to devise the most appropriate sentence designed with rehabilitation in mind is unquestioned. The Ninth Circuit

Court of Appeals described the purposes of probation in this way:

> The development of a sensible probationary system necessarily requires that the trial court be vested with broad discretionary powers. It also requires that any condition which is imposed following conviction, whether or not it touches upon "preferred" rights, must be viewed in the context of the goals underlying the [Federal Probation] Act. Thus, the crucial determination in testing probationary conditions is not the degree of "preference" which may be accorded those rights limited by the condition, but rather whether limitations are primarily designed to affect the rehabilitation of the probationer or insure the protection of the public.

United States v. Consuelo-Gonzalez, 521 F.2d 259, 265 n.14 (9th Cir. 1975). Here, the concern for rehabilitation was the driving force behind the initial sentence and later the revocation of probation. Mont. Code Ann. § 46-18-201(a)(xii) provides that a sentencing court may impose any reasonable condition considered necessary for rehabilitation or protection of society. The sentencing court was following this provision in imposing the condition that Imlay complete sex offender therapy, and ultimately accept responsibility for the sexual assault. *See also* brief of *amicus curiae*, American Professional Society on the Abuse of Children; § 3E1.1, U.S.S.G., which allows for two-point reduction of sentence for acceptance of responsibility. A probation condition requiring acceptance of responsibility is valid on its face since it is rationally related to the rehabilitation of a defendant. *See Gollaher v. United States*, 419 F.2d 520 (9th Cir. 1969) (recognition of fault is first step toward rehabilitation);

United States v. Hull, 792 F.2d 941 (9th Cir. 1986) (may impose harsh sentence for refusal to admit guilt).

B. Statements Sought for the Purpose of Treatment or Therapy Are Not Considered Incriminating Under the Fifth Amendment Privilege Against Self-incrimination.

The statements concerning acceptance of responsibility were never sought by the State of Montana with the purpose to obtain information to be used against Imlay in a future criminal prosecution. Indeed, the purpose was exactly the opposite. The purpose of obtaining the statements was to aid Imlay in overcoming his denial, thereby taking the first step toward meaningful rehabilitation. When a state solicits statements for the purposes of rehabilitation, rather than punishment or incarceration, the statements cannot be considered incriminating.

This Court, in explaining the boundaries of the Fifth Amendment privilege, has recognized a critical distinction between statements that may be used for punishment and statements that may be required solely for the purposes of treatment and rehabilitation. In *Allen v. Illinois*, 478 U.S. at 372, this Court held that the right against self-incrimination did not apply to an Illinois proceeding in which a defendant was designated a sexually dangerous person, stating:

> The Court in *Gault* [387 U.S. 1 (1967)] was obviously persuaded that the State intended to *punish* its juvenile offenders, observing that in many States juveniles may be placed in "adult penal institutions" for conduct that if committed by an adult would be a crime. . . . Here, by contrast,

> the State serves its purpose of treating rather than punishing sexually dangerous persons by committing them to an institution expressly designed to provide psychiatric care and treatment. That the Menard Psychiatric Center houses not only sexually dangerous persons but also prisoners from other institutions who are in need of psychiatric treatment does not transform the State's intent to treat into an intent to punish. [Emphasis in original.]

478 U.S. at 373. Statements required for treatment and rehabilitation rather than for punishment generally do not fall within the parameters of Fifth Amendment protections. *See also Taylor v. Best*, 746 F.2d 220, 224 (4th Cir. 1984), *cert. denied*, 474 U.S. 982 (1985) (no Fifth Amendment violation when the clear purpose of the mental evaluation is to assign the prisoner to the appropriate institution at the appropriate custody level with a basic program plan for treatment that fits his rehabilitation and training needs). Here, treatment, not the solicitation of incriminating statements, was a primary objective in devising the probation condition and then later in revoking probation. Given that the intention of the treatment was not to solicit incriminating statements, there can be no violation of the Fifth Amendment.

C. The Statements Sought From Imlay Concerning the Crime for Which He Had Been Convicted Do Not Pose a Realistic Threat of Future Criminal Prosecution.

To assert the privilege against self-incrimination, an individual must be "confronted by substantial and 'real', and not merely trifling or imaginary, hazards of incrimination." *United States v. Apfelbaum*, 445 U.S. 115, 128

(1980), quoting *Marchetti v. United States*, 390 U.S. 39, 53 (1968); *see also Rogers v. United States*, 340 U.S. 367, 374-75 (1951); *Brown v. Walker*, 161 U.S. 591, 599-600 (1896).

There was no danger or realistic threat that Imlay's discussion of the crime of which he had been convicted could be used to incriminate him in any future criminal proceedings. He was convicted of the sexual assault and could not again be so convicted. As a general rule, once a person is convicted of a crime, he no longer may assert the privilege against self-incrimination with regard to those acts because he can no longer be incriminated by his testimony about the crime. *Reina v. United States*, 364 U.S. at 513. In *State v. Gleason*, 576 A.2d 1246 (Vt. 1990), the Vermont Supreme Court summarily rejected a probationer's claim that his Fifth Amendment privilege against self-incrimination was violated by having to complete sex offender therapy and accept responsibility of the crime for which he had been convicted. The Vermont Court stated that "the imposition of sentence extinguishes the privilege against self-incrimination with respect to the crime of which the accused is convicted and, because of the protection against double jeopardy, defendant faces no threat of subsequent prosecution for the offense." *Id.* at 1250. *See also State v. Post*, No. 57846-0 (Wash. S. Ct. Mar. 12, 1992) (statements not incriminating that related to crime for which defendant was convicted).

Imlay had already been convicted and sentenced,[9] and the period for appeal time had expired when the

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[9] When Imlay was initially sentenced, his testimony at trial in which he denied the sexual assault was not used against him. In fact, he was shown leniency through a suspended sentence designed to help him overcome the denial of

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concerns over his Fifth Amendment rights arose.[10] Because his appeal time had run, the possibility of self-incrimination with respect to the crime of which he had been convicted was basically nonexistent.[11]

The Montana Supreme Court suggested that by successfully completing treatment and accepting responsibility for the crime of which he had been convicted, Imlay would be forfeiting his opportunity to challenge

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his behavioral problem. In *Estelle v. Smith*, 451 U.S. 454 (1981), this Court recognized that the privilege against self-incrimination extends into the sentencing stage of a capital case, reasoning that "[j]ust as the Fifth Amendment prevents a criminal defendant from being made 'the deluded instrument of his own conviction' . . . it protects him as well from being made the 'deluded instrument' of his own execution." 451 U.S. at 462.

The fears which motivated this Court to extend the Fifth Amendment privilege in *Estelle* are simply not present here. Because the condition of probation requiring sex offender treatment was, in fact, an act of leniency designed to promote rehabilitation and treatment, Imlay's Fifth Amendment privilege was not infringed when the condition was initially imposed.

[10] Under Rule 5(b), Mont. R. App. P., an appeal from a judgment in a criminal case must be taken within 60 days of conviction.

[11] *See United States v. Gonzalez-Mares*, 752 F.2d 1485, 1490 n.5 (9th Cir.), *cert. denied*, 473 U.S. 913 (1985) (after conviction, the danger of introducing responses to a probation officer's questions at trial is virtually non-existent); *McCormick on Evidence*, § 121 at 290-91 (3d ed. 1984) (only where appeal as of right is pending or is still available have the courts lent a sympathetic ear to the argument that disclosures concerning the crime might be used in a reprosecution).

his conviction on collateral attack or if there were newly discovered evidence. (Pet. App 14a.) The privilege against self-incrimination is not based on such vague and indefinite possibilities. Because Imlay no longer had any fear of self-incrimination after conviction, he logically could not invoke the privilege in postconviction proceedings. *McQueen v. Commonwealth*, 721 S.W.2d 694, 703 (Ky. 1986) (a petitioner has no privilege against self-incrimination in state postconviction proceedings with respect to statements concerning the crime for which he already has been convicted, citing the general rule in *Reina*); *Gall v. Commonwealth*, 702 S.W.2d 37, 45 (Ky. 1985), *cert. denied*, 478 U.S. 1010 (1986). *See also United States v. Heldt*, 668 F.2d 1238, 1253 (D.C. Cir. 1981), *cert. denied*, 456 U.S. 426 (1982) (grand jury witness may not invoke privilege of self-incrimination with respect to crimes of which he was already convicted).[12] Because Imlay has never challenged

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[12] Two states have taken rather equivocal positions in deciding that the Fifth Amendment privilege extends to postconviction proceedings on a case-by-case basis and turns upon whether there is a "real and appreciable" danger of self-incrimination that would jeopardize collateral relief. *State v. Verdugo*, 602 P.2d 472 (Ariz. 1979) (threat of incrimination was "imaginary and insubstantial" because the appellant's conviction had been affirmed on appeal four years earlier, no petition for postconviction relief had been filed, and defense counsel estimated that the likelihood of success on collateral attack was only 15 to 30 percent); *Commonwealth v. Rodgers*, 372 A.2d 771 (Pa. 1977) (determination of whether witness whose conviction has been finalized on appeal and who is preparing a collateral

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his conviction, no harm can result from discussion of the crime for which he was convicted and there can be no real or substantial threat to the privilege against self-incrimination in collateral proceedings.[13]

The Montana Court also suggested that Imlay's statements to a therapist admitting that he had committed the crime might expose him to a perjury charge. (Pet App.14a.)[14] This suggestion is without realistic legal

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attack may invoke privilege against self-incrimination is left to discretion of trial court); *but see Commonwealth v. Strickler*, 393 A.2d 313 (Pa. 1978); *Commonwealth v. Long*, 583 A.2d 428 (Pa. Super. Ct. 1990) (disapproving of *Rodgers* and finding no privilege of self-incrimination after conviction).

[13] After conviction and sentencing are completed, and the time for appeal has run, a case is deemed final. *Griffith v. Kentucky*, 479 U.S. 314, 321 n.6 (1987). Imlay's conviction is now deemed final because it has never been timely appealed. It would seem contrary to the concept of finality to preclude a state from proceeding with appropriate treatment because, at some point, a defendant might want to collaterally attack his conviction. Further, it would seem contrary to the concept of finality to preclude treatment because someday new evidence may be discovered that would exonerate a defendant. Once a conviction is final, and because the Fifth Amendment prohibits only a realistic threat of future criminal prosecution, these mere possibilities should not be considered controlling in light of the necessity to proceed with appropriate treatment.

[14] It is interesting that there is no indication in the record that Imlay refused to accept responsibility at treatment because of fear of a perjury charge. This concern was raised for the first time by the Montana Supreme Court. The Montana Court's concern about perjury arose from its misplaced reliance on the

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foundation. In the first instance, admitting to a crime in therapy is not perjury under Montana law.[15] Further, under Montana law, statements made in therapy cannot be used in a subsequent criminal prosecution. *State v. Thiel*, 768 P.2d 343, 345 (Mont. 1989) (violation of Fifth Amendment privilege occurs if future charges are based on uncharged criminal acts that are revealed during a mental evaluation). Because any statement that Imlay made in therapy could not be used as proof of perjury, he was never under a realistic threat of future prosecution of the crime.[16]

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case of *Thomas v. United States*, 368 F.2d 941 (5th Cir. 1966). In *Thomas*, the sentencing court threatened the defendant with a longer sentence unless he confessed to the court that he was guilty of the crime of which he had been convicted. Imlay's situation was much different from that of a defendant standing in open court. Imlay's statements would have been given in a treatment setting where he would be discussing a behavioral problem and where such statements are protected.

[15] Mont. Code Ann. § 45-7-201, MCA, provides that a "person commits the offense of perjury if in any official proceeding he knowingly makes a false statement under oath or equivalent affirmation or swears or affirms the truth of a statement previously made, when the statement is material."

[16] Even if Imlay's statements to a therapist could somehow be construed as evidence that Imlay had lied at trial and thereby perjured himself when he denied the crime, Imlay's Fifth Amendment privilege would not shield him from such a charge. Imlay did not exercise his Fifth Amendment privilege at trial, but instead freely testified in his own behalf, denying the crime. Once a witness proceeds to freely testify in his own defense or even through compelled immunized testimony, it is well settled that the Fifth Amendment privilege does not

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Further, such an unrealistic threat carries little weight when considered with the otherwise overriding concerns of the state in supervising its probationers and administering appropriate treatment programs that foster rehabilitation. In *United States v. Henry*, 883 F.2d 1010 (11th Cir. 1989), one of the issues was whether the federal sentencing guideline allowing a two-point sentence reduction for acceptance of responsibility violated the defendant's Fifth Amendment privilege because it exposed him to possible perjury charges. The Court of Appeals had little difficulty in summarily dismissing the perjury argument. The Court refused to equate the possibility of leniency with impermissible punishment and

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protect perjured testimony. In *Harris v. New York*, 401 U.S. 222, 225 (1971), this Court stated that "[e]very criminal defendant is privileged to testify in his own defense, or refuse to do so. But that privilege cannot be construed to include the right to commit perjury." Imlay had no Fifth Amendment protections that extended to his false testimony. *Nix v. Whiteside*, 475 U.S. 157, 173 (1986). Imlay, therefore, would not be shielded by the Fifth Amendment with respect to his testimony, perjured or otherwise, that was freely given at trial.

Such reasoning has also been uniformly followed in the context of a witness who committed perjury while testifying under the grant of immunity. *See United States v. Mandujano*, 425 U.S. 564, 583-84 (1976) ("[The Fifth Amendment] privilege cannot be construed to include the right to commit perjury," quoting *Harris v. New York*, 401 U.S. 222, 225 (1971)); *United States v. Wong*, 431 U.S. 174, 180 (1977) (" 'Our legal system provides methods for challenging the Government's right to ask questions – lying is not one of them.' " (*quoting Bryson v. United States*, 396 U.S. 64, 72 (1969)); *United States v. Apfelbaum*, 445 U.S. at 126 (grant of immunity does not preclude prosecution for perjured testimony given under grant).

found that the choice imposed by the sentencing guideline was constitutionally permissible. *See* § 3E1.1, U.S.S.G.; *United States v. Rowland*, 906 F.2d 621 (11th Cir. 1990) (reaffirming perjury analysis in *Henry* by holding that § 3E1.1 is not a penalty but rather provides for leniency); *United States v. Gonzalez*, 897 F.2d 1018, 1021 (9th Cir. 1990) (risk of perjury is not controlling consideration because sentencing guideline is considered a benefit rather than punishment).

Similarly, with respect to the condition that a probationer complete sex offender therapy and accept responsibility for the crime of which he was convicted, the condition provides a means of granting leniency and providing the benefit of treatment for an offender in a community-based program. It is therefore illogical and inconsistent to inject the threat of perjury into this setting. As the Eleventh Circuit recognized in *United States v. Henry, supra,* and the Ninth Circuit recognized in *United States v. Gonzalez, supra,* the risk of perjury may not be used to preclude the benefit of leniency and treatment.

II. THE THREAT OF REVOCATION OF PROBATION FOR FAILURE TO ACCEPT RESPONSIBILITY OF THE CRIME OF WHICH A PROBATIONER HAS BEEN CONVICTED IS NOT A PENALTY THAT TRIGGERS FIFTH AMENDMENT PROTECTIONS.

Because this matter involves supervision of a probationer, the controlling cases are necessarily those that set the parameters of a probationer's rights and privileges, and those that establish the propriety of revoking probation when treatment has failed or when the safety of the

community becomes a paramount concern. In *Gagnon v. Scarpelli*, 411 U.S. 778 (1973), this Court recognized that a probation revocation proceeding is not a criminal prosecution, but rather a civil proceeding.[17] Consequently, a probationer has no Fifth Amendment rights with respect to statements that would result in revocation of the probation unless the statements would also serve to incriminate the probationer in future criminal proceedings. *Minnesota v. Murphy*, 465 U.S. at 435, n.7; *Lefkowitz v. Turley*, 414 U.S. at 77. With respect to answers concerning compliance with his probationary condition, Imlay essentially had no Fifth Amendment rights.[18]

Because a truthful response to the therapist's questions were solicited solely for treatment purposes and not to further a future criminal prosecution, the State of Montana properly insisted that Imlay respond or suffer the consequences of revocation. *See Minnesota v. Murphy*, 465 U.S. at 441-42 (Marshall, J., dissenting). Revocation of

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[17] "Probation revocation, like parole revocation, is not a stage of a criminal prosecution, but does result in a loss of liberty." *Gagnon*, 411 U.S. at 782.

[18] *See also United States v. Gonzalez-Mares*, 752 F.2d at 1489-90 (*citing Murphy* for the general rule that a probationer is not entitled to invoke the privilege against self-incrimination in response to questions about probation status); *Wilson v. State*, 621 P.2d 1173 (Okla. Crim. App. 1980) (revocation proceeding is not a criminal proceeding for Fifth Amendment purposes); *State v. Burow*, 394 N.W.2d 665, 667 (Neb. 1986) (*quoting Murphy* and holding that the privilege against self-incrimination affords no protection in a probation revocation proceeding). The effect of this now widely accepted rule is that Imlay could not validly say, "I refuse to answer on the grounds that my probation may be revoked."

probation, free from due process violations, is a valid exercise of a court's power to terminate a supervised community-based course of rehabilitation. As this Court has stated:

> "Revocation . . . is, if anything, commonly treated as a failure of supervision. While presumably it would be inappropriate for a field agent *never* to revoke, the whole thrust of the probation-parole movement is to keep men in the community, working with adjustment problems there, and using revocation only as a last resort when treatment has failed or is about to fail."

Gagnon v. Scarpelli, 411 U.S. at 785 (emphasis in original.)[19] Here, it is undisputed that the attempt at treating Imlay in an outpatient setting failed. The sentencing court revoked Imlay's probation in order to provide more structured, daily inpatient sex offender therapy available only at the Montana State Prison. The revocation by the sentencing court was in accordance with the generally accepted view, as recognized in *Gagnon*, that if the treatment on which probation is based fails, then probation may be revoked.[20]

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[19] Quoting F. Remington, D. Newman, E. Kimball, M. Melli & H. Goldstein, *Criminal Justice Administration, Materials and Cases* 910-911 n.7 (1969).

[20] Other states have readily found that failure to accept responsibility as part of a probationary condition indicates a violation of a valid condition and revocation is appropriate. *See, e.g., State v. Gleason, supra* (failure to accept responsibility in sex offender treatment was sufficient to justify revocation of

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That revocation resulted in incarceration did not necessarily trigger Fifth Amendment concerns. Disapproving of prior statements in the opinion in *In re Gault*, 387 U.S. at 50, this Court in *Allen v. Illinois, supra*, stated: "First, *Gault*'s sweeping statement that 'our Constitution guarantees that no person shall be "compelled" to be a witness against himself when he is threatened with deprivation of his liberty' . . . *is plainly not good law.*" 478 U.S. at 372 (emphasis added) (citation omitted). Even though Imlay's denial of the crime may result in revocation, loss of liberty does not offend the privilege against self-incrimination because the loss was based upon a concern for treatment and rehabilitation, rather than punishment.

Moreover, implicit in *Minnesota v. Murphy, supra*, is the conclusion that revocation of probation does not create a coercive situation when revocation is directly

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probation); *State v. Orseth*, 359 N.W.2d 852 (N.D. 1984) (failure to comply with chemical dependency treatment by not confronting problem and merely attending meetings was sufficient to revoke probation); *State v. Rock*, 380 N.W.2d 211 (Minn. Ct. App. 1986) (lack of a desire to change and little motivation in sex offender treatment program sufficient to revoke probation); *State v. Bennett*, 666 P.2d 390 (Wash. Ct. App. 1983) (probation properly revoked because probationer not amenable to sex offender treatment); *State v. Smith*, 812 P.2d 470 (Utah Ct. App. 1991) (revocation may be based on inability to complete sex offender program because of psychological denial). *Cf. Gilfillen v. State*, 582 N.E.2d 821 (Ind. 1991) (probation may not be revoked for failure to accept responsibility for crimes of which defendant was convicted); *People v. Prusak*, 558 N.E.2d 696 (Ill. App. Ct. 1990) (probation revocation improper when based on failure to accept responsibility for sexual misconduct).

related to the failure of a probationary condition. While recognizing that it would be improper to threaten revocation in order to have a probationer reveal acts concerning uncharged conduct, this Court stated in a very important qualifying footnote:

> The situation would be different if the questions put to a probationer were relevant to his probationary status and posed no realistic threat of incrimination in a separate criminal proceeding. . . . Although a revocation proceeding must comport with the requirements of due process, it is not a criminal proceeding. . . . Just as there is no right to a jury trial before probation may be revoked, neither is the privilege against compelled self-incrimination available to a probationer. . . .
>
> Our cases indicate, moreover, that a State may validly insist on answers to even incriminating questions and hence sensibly administer its probation system, as long as it recognizes that the required answers may not be used in a criminal proceeding and thus eliminates the threat of incrimination. . . . [A]nd nothing in the Federal Constitution would prevent a State from revoking probation for a refusal to answer that violated an express condition of probation or from using the probationer's silence as "one of a number of factors to be considered by the finder of fact" in deciding whether other conditions of probation have been violated. *Lefkowitz v. Cunningham, supra,* 431 U.S., at 808, n. 5, 97 S.Ct., at 2137, n. 5. *See Baxter v. Palmigiano,* 425 U.S. 308, 317-318, 96 S.Ct. 1551, 1557-1558, 47 L.Ed.2d 810 (1976).

Minnesota v. Murphy, 465 U.S. at 435, n.7 (some citations omitted). Revocation for failure to accept responsibility of the crime of which a probationer has been convicted is therefore appropriate and valid when it is based upon a failure of the probation condition itself and not upon a probationer's refusal to reveal incriminating statements that pose a realistic threat of future prosecution.

The State's interest in protecting the safety of the public is also a fundamental consideration in designing a probation condition and eventually deciding when to revoke probation. Here, Imlay's probation officer testified that her largest concern was the risk that Imlay posed to the community. In her assessment, an offender who maintains denial is "obviously in greater risk of reoffending than one who is recognizing and accepting responsibility for his problem." (Tr. at 11.) Michael Sullivan, Imlay's therapist, echoed this concern stating that it was unethical for him to continue outpatient treatment of a person who was in denial and therefore a threat to community safety. (Tr. at 42.)[21]

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[21] In its original sentencing order, the sentencing court stated that it had accepted the defense attorney's representations that Imlay "is not a dangerous person and that the present offense was an isolated incident which will not be repeated in the future." (J.A. 21.) In light of the subsequent testimony at the revocation hearing indicating that Imlay's denial made him a threat for reoffending and a possible danger to the community, and the sentencing court's decision to revoke probation, it may be assumed that the sentencing court reevaluated its original impression of the prospects of Imlay reoffending.

The concerns for proper treatment and public safety justify the imposition of an appropriate probation condition, and the attendant "enforcement leverage" of probation revocation. *Morrisey v. Brewer*, 408 U.S. 471, 478-79 (1972). In *Morrisey*, in the context of parole revocation, this Court acknowledged the propriety of the state imposing restrictions upon a parolee's freedom and enforcing those restrictions when deemed necessary:

> Release of the parolee before the end of his prison sentence is made with the recognition that with many prisoners there is a risk that they will not be able to live in society without committing additional antisocial acts. Given the previous conviction and the proper imposition of conditions, the State has an overwhelming interest in being able to return the individual to imprisonment without the burden of a new adversary criminal trial if in fact he has failed to abide by the conditions of his parole.

408 U.S. at 483. Because Imlay maintained his denial, he was considered by his probation officer as a continuing threat to the welfare of the community due to the likelihood of reoffending.

The Montana court nevertheless considered the revocation a type of "penalty," thereby presumably invoking the decisions from this Court involving witnesses who had been compelled to testify and forced to choose between the valid exercise of Fifth Amendment rights and the imposition of economic or other sanctions.[22] The penalty cases are not controlling here because

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[22] *See Garrity v. State of New Jersey, supra* (statements made under the threat of removal from office may not be used in

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this matter involves imposition of an appropriate probation condition designed to further treatment of a probationer. The threat of revocation as part of the necessary and proper administration of a state's probation system cannot be equated with the threat of economic sanctions upon the valid assertion of Fifth Amendment rights. Because the probation system involves the overwhelming interest of the state in supervising its probationers and protecting the public, the threat of revocation and revocation itself are constitutionally valid exercises of the state's authority to protect the public and determine the appropriate treatment for convicted defendants.

While the penalty cases recognize that a state employee could not be given the Hobson's choice of losing a job or exercising the Fifth Amendment privilege, the cases concurrently recognize that individuals "may be compelled to respond to questions about the performance of their duties but only if their answers cannot be used against them in subsequent criminal prosecutions." *Lefkowitz v. Turley*, 414 U.S. at 79. Thus, certain questions are permissible as is the attendant enforcement for failure

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subsequent criminal proceedings); *Gardner v. Broderick, supra* (discharge from employment for refusal to waive privilege against self-incrimination is violative of Fifth Amendment); *Uniformed Sanitation Men Ass'n v. Comm'r of Sanitation*, 392 U.S. 280 (1968) (loss of employment is an impermissible penalty for exercising privilege against self-incrimination); *Lefkowitz v. Turley, supra* (threat of substantial economic sanctions creates involuntary waiver of Fifth Amendment privilege); *Lefkowitz v. Cunningham, supra* (regulation requiring waiver of Fifth Amendment privilege or loss of political office imposed impermissible penalty for exercising privilege).

to respond to such questions if the questions and responses relate to the public interest and do not hinder the Fifth Amendment privilege. In *Uniformed Sanitation Men, supra,* this Court stated:

> Petitioners as public employees are entitled, like all other persons, to the benefit of the Constitution, including the privilege against self-incrimination [citing cases]. At the same time, petitioners, being public employees, subject themselves to dismissal if they refuse to account for their performance of their public trust, after proper proceedings which do not involve an attempt to coerce them to relinquish their constitutional rights.

392 U.S. at 284-85. Similarly, Imlay, as a probationer, subjected himself to the conditions that the state deemed necessary for his rehabilitation and treatment, and which provided adequate protection of society. Imlay's continued denial indicated a failure of treatment and thus the public interest in community safety and inpatient treatment for Imlay became the controlling considerations. The revocation therefore offended no constitutional principles.

The Second Circuit Court of Appeals recently applied similar reasoning in *Asherman v. Meachum,* No. 90-2530 (2d Cir. Feb. 13, 1992) (en banc), reversing the panel decision in *Asherman v. Meachum,* 932 F.2d 137 (2d Cir. 1991). In *Asherman* a federal habeas petitioner claimed that his privilege against self-incrimination was violated when his supervised home release status was revoked because of his refusal to undergo a mental examination concerning the crime for which he was convicted. The

Court of Appeals held that public agencies have the authority to ask questions relevant to their public responsibilities and to take adverse action against those whose refusal to answer impedes the discharge of those duties. The inquiry and sanctions were proper as long as the consequence is imposed for failure to answer a relevant inquiry and not for refusal to give up a constitutional right. Similarly, Imlay's revocation was proper, as it was based on his failure to complete treatment, not on a refusal to give up a constitutional right.

III. *THOMAS* AND SIMILAR CASES ARE NEITHER APPLICABLE NOR CONTROLLING.

The Montana Supreme Court relied almost exclusively upon the reasoning in *Thomas v. United States, supra*. In *Thomas*, the sentencing judge had told the defendant, after he had been convicted but just before sentencing, that if he would "come clean" the court would take his acceptance of responsibility into account in determining the length of the sentence. But if the defendant persisted in denying that he had participated in the robbery for which he had been convicted, the court would also consider his denial. 368 F.2d. at 945, n.10. The defendant denied his participation in the robbery and the court imposed the maximum sentence. The Fifth Circuit Court of Appeals reversed the sentencing decision, holding that Thomas retained his Fifth Amendment rights because he had not been finally and irretrievably adjudged guilty, and still had the option to appeal. Also, the Court noted that Thomas could not be forced to abandon his Fifth

Amendment protections as to perjury or postconviction remedies.

The *Thomas* decision is readily distinguishable both factually and legally from Imlay's case. First, Imlay's failure to accept responsibility for the crime for which he was convicted did not involve an increase or augmentation in his sentence. Imlay's sentence was suspended and he was initially given the opportunity for outpatient treatment, despite his denial of the crime. At the sentencing stage, he was therefore not penalized in any way for failing to accept responsibility of the crime. Moreover, because Imlay did not appeal his conviction or initial sentence, any statements made during therapy could not be used to jeopardize a possible appeal.

Two opinions of this Court supersede the reasoning used in the *Thomas* decision that a sentencing court may not consider a defendant's denial of the crime of which he was convicted. In *United States v. Grayson, supra,* this Court considered the issue of whether it was improper for a sentencing judge, in fixing a sentence within the statutory limits, to give consideration to the defendant's false testimony observed by the judge during the trial. The false testimony to which the Court referred was simply the defendant's denial of the offense in the face of contradictory evidence. This Court found consideration of the denial proper, reasoning that a "defendant's truthfulness or mendacity while testifying on his own behalf, almost without exception, has been deemed probative of his attitudes toward society and prospects for rehabilitation and hence relevant to sentencing." 438 U.S. at 50. Thus, such evidence was found to be not only proper, but necessary to the sentencing decision:

> [T]he evolutionary history of sentencing, set out in Part II, demonstrates that it is proper – indeed, even necessary for the rational exercise of discretion – to consider the defendant's whole person and personality, as manifested by his conduct at trial, and his testimony under oath, for whatever light that may shed on sentencing decisions.

438 U.S. at 53. *Grayson* supersedes the reasoning in *Thomas, supra,* because *Grayson* recognizes the propriety of considering, during the sentencing process, the defendant's denial of the acts of which he was convicted.

In *Roberts v. United States,* 445 U.S. 552 (1980), this Court upheld consideration at sentencing of a defendant's refusal to identify his drug supplier. It was conceded that cooperation with authorities was a laudable endeavor that bore a rational connection to a defendant's willingness to change his behavior. *Id.* at 557. Thus, the consideration at sentencing of the defendant's refusal to cooperate was appropriate because his refusal was an indicator of his prospects for his rehabilitation. Quoting *Grayson,* this Court stated:

> Few facts available to a sentencing judge are more relevant to "the likelihood that [a defendant] will transgress no more, the hope that he may respond to rehabilitative effort to assist with a lawful future career, [and] the degree to which he does or does not deem himself at war with his society."

Roberts v. United States, supra, 445 U.S. at 558, *quoting United States v. Grayson, supra,* 438 U.S. at 51. The *Grayson* and *Roberts* decisions recognize that there is a critical difference between penalizing a defendant for remaining

silent or maintaining his innocence, and considering the defendant's character and prospects for treatment and rehabilitation as reflected in the defendant's willingness to accept responsibility for his criminal conduct. Because a sentencing court may consider all aspects of a defendant's character, including his denial of the act of which he was convicted, the *Thomas* decision lacks any persuasive authority to the extent it held that a defendant's denial of the crime may not be considered at sentencing.

The adoption of federal sentencing guideline § 3E1.1, which expressly allows a reduction in sentence for acceptance of responsibility also significantly diminishes the authoritative value of *Thomas*. The Fifth Circuit Court of Appeals, with no reference to its earlier decision in *Thomas v. United States*, expressly upheld the sentencing guideline when faced with a Fifth Amendment challenge. *See United States v. Mourning*, 914 F.2d 699 (5th Cir. 1990) (the government is permitted to award contrition which is not the same as compelling self-incrimination).

While the circuits differ somewhat as to whether § 3E1.1 encompasses criminal conduct other than that for which a defendant has been convicted, the circuits uniformly hold that the sentencing guideline does not offend the Fifth Amendment with respect to the crime for which a defendant has been convicted. *United States v. O'Neil*, 936 F.2d 599 (1st Cir. 1991) (no violation of -privilege against self-incrimination because sentencing court may require acceptance of responsibility of charged conduct as well as consider conduct after conviction and during bail); *United States v. Oliveras*, 905 F.2d 623 (2d Cir. 1990) (no violation of the privilege against self-incrimination with respect to the counts to which a defendant pled

guilty); *United States v. Frierson*, 945 F.2d 650 (3d Cir. 1991), *cert. denied*, No. 91-6849 (Mar. 23, 1992) (no violation of Fifth Amendment for sentencing court to consider acts of which defendant convicted as well as uncharged acts because statements were not "compelled" under *Minnesota v. Murphy*); *United States v. Gonzalez*, *supra* (Fifth Amendment not offended by defendant who seeks reduction under § 3E1.1 but who maintained his innocence throughout trial); *United States v. Rogers*, 921 F.2d 975 (10th Cir.), *cert. denied*, 111 S. Ct. 113 (1990) (no violation of Fifth Amendment because defendant was required to divulge circumstances of the crime for which he was convicted, not circumstances concerning unproved, uncharged conduct); *United States v. Henry*, *supra* (no self-incrimination violation for defendant who maintained innocence at trial because Court was unwilling to equate the possibility of leniency with impermissible punishment). Given the uniformity of these decisions which hold that consideration of acceptance of responsibility at the sentencing stage does not offend Fifth Amendment principles, *Thomas v. United States*, *supra*, can hardly be considered controlling.

CONCLUSION

The probation condition properly required Imlay to accept responsibility for the crime of which he was convicted as the first step toward meaningful rehabilitation. Further, the condition did not offend Fifth Amendment principles because it was designed for treatment purposes and did not require Imlay to make statements that

would realistically subject him to future criminal prosecution. Revocation of probation was not a penalty precluded by the Fifth Amendment privilege, but was appropriate and necessary when Imlay's continued denial made outpatient therapy unworkable. The Montana Supreme Court therefore incorrectly held that Imlay's Fifth Amendment privilege precluded the imposition of a probation condition requiring acceptance of responsibility of the crime of which he had been convicted and improvidently reversed the revocation of Imlay's suspended sentence.

The State of Montana therefore asks that the decision of the Montana Supreme Court be reversed.

Respectfully submitted,

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